

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

In the Matter of	)	
	)	
Promotion of Competitive Networks in	)	
Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association	)	
International, Inc. Petition for Rulemaking to	)	
Amend Section 1.4000 of the Commission's Rules	)	
to Preempt Restrictions on Subscriber Premises	)	
Reception or Transmission Antennas Designed To	)	
Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry	)	
Association Petition for Rule Making and	)	
Amendment of the Commission's Rules	)	
to Preempt State and Local Imposition of	)	
Discriminatory And/Or Excessive Taxes	)	
and Assessments	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

**REPLY COMMENTS OF TELIGENT, INC.**

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### SUMMARY

- The Commission should define "right-of-way" and "conduit" to include utility facilities within and on top of MTEs, for purposes of Section 224. The myriad of State property law definitions of "right-of-way" should not be used to determine the rights under a federal statute. The Commission's reasonable interpretation of its organic statute is entitled to substantial judicial deference.
- Telecommunications carrier access to a utility's intra-MTE conduit and rights-of-way does not require the authorization of the MTE owner. The MTE owner has already granted the relevant interests to the utility. Such an interpretation of Section 224 would not effect a taking of the MTE owner's property and would compensate the utility for any takings of the utility's property interests, consistent with the statutory scheme.
- Discriminatory and unreasonable restrictions on telecommunications carrier access to MTEs, as well as outright denials or lengthy negotiation delays, negatively affect the competitive telecommunications industry, and deprive consumers of the full benefits of competition. A failure of the Commission to act would discriminate in favor of continued ILEC dominance and against CLECs.
- MTE owner interests vary from those of consumers in MTEs. Consequently, as the comments demonstrate, the market-based incentives are not aligned with the needs of consumers and Commission intervention is warranted.
- The paltry response levels to the Real Access Alliance Survey render it invalid empirically and suggest that the real estate industry is not overly concerned by the prospect of nondiscriminatory telecommunications carrier access to MTEs.
- A nondiscriminatory MTE access requirement is constitutionally sound and would not amount to a taking of MTE owners' property.
- Some real estate industry comments offer examples of MTE owners engaging in wire communications. The Commission's jurisdiction over persons engaged in interstate wire communications is unquestionable and the Commission's authority to mandate nondiscriminatory MTE access is supported in the record.
- The small number of pole attachment complaints pending before the Commission strongly suggests that the enforcement of MTE access requirements will not impose substantial burdens on the Commission.
- Upon the request by an MTE owner, a telecommunications carrier, or a customer, the Commission should require relocation of the demarcation point in all MTEs at the minimum point of entry. Moreover, CLEC technicians should be permitted to connect CLEC facilities to the ILEC's intra-MTE facilities without the presence of ILEC technicians. ILEC escort requirements involve unnecessary and unreasonable delays for consumers and CLECs alike.

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**REPLY COMMENTS OF TELIGENT, INC.**

Teligent, Inc. ("Teligent") hereby submits its reply comments in the above-captioned proceeding.<sup>1</sup>

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<sup>1</sup> Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, WT Docket No. 99-217

**I. INTRODUCTION**

The comments confirm that unreasonable and discriminatory restrictions on telecommunications carrier access to MTEs is negatively affecting the growth of telecommunications competition. Not only have ALTS and several carriers explained and demonstrated this, but the real estate industry's own flawed statistical submission documents that more than 1/5 of the respondents were involved in negotiations for access by carriers to their tenants lasting over one year and 44 percent of respondents may have entirely refused access to competitive telecommunications carriers. The record, which is replete with evidence of competition delayed and competition denied, demonstrates that without Commission intervention, the market cannot be relied upon to resolve the matter. The Commission has been presented with several solutions, all of which serve important functions in promoting the widest, most vibrant competitive market for consumers to enjoy. No single solution, standing alone, is sufficient to eliminate the MTE access problem. Rather, the Commission must pursue a comprehensive strategy that involves compliance by utilities, CLECs, and MTE owners with simple but very important principles of reasonableness and nondiscrimination.

Some real estate interests seek to weaken the Commission's resolve by crafting alarmist and unrealistic scenarios depicting what nondiscriminatory access will involve for this country's MTEs. While the security and safety of MTEs and the tenants therein are crucial -- a concern competitive carriers share with the real estate industry -- these interests can be and are being preserved consistent with reasonable telecommunications carrier access. Teligent certainly has a

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and CC Docket No. 96-98, *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, FCC 99-141 (rel. July 7, 1999)("Notice").

strong commitment to these important concerns as reflected in its present operational practices, and its lease and license terms, and works with MTE owners to ensure that access is achieved in a manner that promotes competition without risking harm to an MTE or its tenants. However, not unlike the wars over protective coupling arrangements in the decade following the *Carterfone* decision,<sup>2</sup> many of the real estate comments take very reasonable concerns and exaggerate them, raising problem after problem with alarmist zeal while ignoring simple solutions. Still others seek to increase the rhetoric of the debate to such a level that a workable arrangement seems impossible -- but a solution is *not* impossible.

That a workable arrangement is possible is made evident by the fact that consumers in a few thousand MTEs *already* have access to their facilities-based telecommunications carrier of choice. Agreements have been reached that accommodate the interests of the consumer, the MTE owner, and the telecommunications carrier. However, because such an extraordinary number of MTEs in this country remain closed to competition for excessively long periods of time or entirely, Teligent urges the Commission to use the principles upon which voluntary agreements have already been reached, find them to be reasonable, and to prevent MTE owners from unreasonably delaying, denying or otherwise preventing tenants from having the opportunity to secure service from the telecommunications carrier of their choice.<sup>3</sup> A

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<sup>2</sup> Carterfone, 13 FCC 2d 420 (1968), *reconsideration denied* 14 FCC 2d 571 (1968). History suggests strongly that the alarmist safety concerns raised by the Bell System in the aftermath of the *Carterfone* decision were without merit and appeared to have been designed as mechanisms to delay competitive entry. See, e.g., Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS), Docket No. 19528, *First Report and Order*, 56 FCC 2d 593 (1975).

<sup>3</sup> Teligent attaches to these Reply Comments two different MTE access agreements, the terms of which have been found reasonable and agreed to by MTE owners and Teligent.

requirement of reasonable and nondiscriminatory telecommunications carrier access to MTEs, consistent with Teligent's comments and reply comments, will accomplish this goal.

**II. THE PROPER INTERPRETATION OF SECTION 224 CAN FACILITATE FACILITIES-BASED TELECOMMUNICATIONS CARRIER ACCESS TO CONSUMERS IN MTEs.**

Through its interpretation of the scope of "conduit" and "rights-of-way," the Commission can use its authority under Section 224 -- recently confirmed by yet another federal appeals court -- to promote facilities-based telecommunications carrier access to utility conduits and rights-of-way within MTEs. In their comments, utilities contended that Section 224 is unconstitutional.<sup>4</sup> They urged the Commission to refrain from acting pursuant to that provision of the Act until the Eleventh Circuit Court of Appeals finished its review of the constitutionality of that provision.<sup>5</sup> Now, the constitutional soundness of Section 224 has been reconfirmed by the Eleventh Circuit Court of Appeals. Thus, utility statements to the contrary have been rejected and calls for Commission delay on the issue are rendered moot.

The Eleventh Circuit held that Section 224 is constitutionally sound.<sup>6</sup> Because "a utility has no choice but to permit a cable company or telecommunications carrier to permanently occupy physical space on its poles, ducts, conduits and rights-of-way," the provision effects a *per*

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The terms of these agreements may provide the Commission some guidance on nondiscriminatory MTE access rules that would be generally acceptable to reasonable MTE owners and telecommunications carriers.

<sup>4</sup> See Comments of American Electric Power et al. at 5-6; Electric Utilities Coalition at 5-6.

<sup>5</sup> See Comments of American Electric Power et al. at 5-6; Electric Utilities Coalition at 5-6; UTC/Edison Electric Institute at 9.

<sup>6</sup> Gulf Power Co. v. United States, No. 98-2403, slip op. (11th Cir., Sept. 9, 1999).

se taking of utility property.<sup>7</sup> But that does not end the inquiry. As Teligent has repeatedly urged the Commission to recognize -- and as utilities and real estate interests are wont to ignore -- takings are not, in and of themselves, constitutionally infirm. Indeed, they are fully constitutional insofar as just compensation is provided to the owner of the property taken. It is precisely this rationale that led the Eleventh Circuit to conclude that Section 224 -- although it effects a taking of private property -- is constitutionally sound. The Court of Appeals determined that the statute provides a process for the Commission to establish just compensation for the taking, and the Commission's decision concerning the level of compensation remains subject to judicial review.<sup>8</sup> Consequently, the Eleventh Circuit rejected the utilities' facial challenge to the statute's constitutionality, leaving no room in this proceeding for arguing to the contrary.

**A. The Commission Should Define The Terms Used In Section 224 So As To Afford Telecommunications Carrier Access To Utility Conduits and Rights-of-Way Within And On Top Of MTEs.**

The many commenters confirm that the term "right-of-way" is not defined precisely in the Act.<sup>9</sup> There are varying suggestions as to the appropriate definition of the term "right-of-way."<sup>10</sup> Utility and real estate commenters claim that the Commission must defer to the different state

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<sup>7</sup> Id. at 9.

<sup>8</sup> Id. at 18.

<sup>9</sup> See, e.g., Comments of American Electric Power, et al. at 17; Florida Power and Light at 15; UTC/Edison Electric Institute at 6 ("Congress did not define what it meant by 'right-of-way'").

<sup>10</sup> See, e.g., Comments of AT&T at 17; BellSouth at 12; American Electric Power at 18-20 (right-of-way is an easement); Electric Utilities Coalition at 16-21 (distinguishing right-of-way from an easement); UTC/Edison Electric Institute at 5.

law definitions of rights-of-way.<sup>11</sup> However, the fact that commenters have presented so many differing possible definitions of "rights-of-way" demonstrates that attempts to give effect to state law definitions in this context will render practical implementation of Section 224 very difficult. A unified definition for federal communications law purposes is called for and would better promote the goals of the 1996 Act. Indeed, it is not uncommon for a particular term to be defined and, consequently, applied by federal law even when such term has also been defined independently and applied by State law.<sup>12</sup>

The meaning of the term "right-of-way," as it is being considered in this rulemaking, is critical to the operation of a *federal* statute. Given that Congress did not define "right-of-way" and because this term falls within the organic statute of the Commission, this represents a classic example wherein courts will afford considerable deference to the Commission's reasonable interpretation of the appropriate meaning of the term.<sup>13</sup> Commenters have provided a strong policy basis for interpreting "rights-of-way" as existing within and on top of MTEs.<sup>14</sup> Moreover,

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<sup>11</sup> See, e.g., Comments of Ameritech at 3; City and County of San Francisco at 10, 12; Electric Utilities Coalition at 12; Florida Power and Light at 24; Real Access Alliance at 54-55; UTC/Edison Electric Institute at 6.

<sup>12</sup> For example, in the telecommunications arena, many State statutes define "local exchange carrier" in a manner different from the definition found in the Communications Act. The differing State definitions result in regulatory treatment at the State level that differs from the treatment that a telecommunications carrier receives pursuant to the federal Communications Act.

<sup>13</sup> Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842044 (1984)(holding that a court must give deference to an administrative agency's reasonable interpretation of a statutory provision).

<sup>14</sup> See, e.g., Comments of ALTS at 3-20; AT&T at 6-8; Bell Atlantic at 3; BlueStar Communications at 3; Competitive Telecommunications Association at 3-5; Fixed Wireless Communications Coalition at 5-9; MCI at 2, 10; McLeodUSA at 2-3;

the Commission's proposal to define "rights-of-way" as existing within and on top of MTEs is reasonable, particularly given the support for this definition in other areas of federal law.<sup>15</sup> Indeed, some utilities concede in their comments that they *do* use their MTE rights-of-way to place their facilities on MTE rooftops.<sup>16</sup> Teligent urges the Commission to adopt the Commission's tentative conclusion.<sup>17</sup>

It is highly inappropriate and inimical to the federalist system to permit state law definitions to govern the operation of a federal statute and to determine the scope of the critical access obligations that the federal statute creates. Where inconsistent, state law cannot be used to render federal law inoperable.

Finally, the Commission noted in the *Local Competition Order* that State law defines property interests.<sup>18</sup> By defining "right-of-way" for purposes of Section 224, however, the Commission would not be creating a new or conflicting property right, it would be establishing a process for applying Section 224. Nevertheless, to the extent that a Commission definition of "right-of-way" conflicts with the statement in the *Local Competition Order* that State law defines property interests, the record in this proceeding and in the UNE remand rulemaking demonstrates

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Metromedia Fiber Network Services at 3-4; NEXTLINK at 8; PCIA at 25; Sprint at 10; and Wireless Communications Association International at 19.

<sup>15</sup> See Teligent Comments at 26-27.

<sup>16</sup> See, e.g., Comments of American Electric Power et al. at 10-11 (noting that some electric utility transformer installations, such as chillers, are located on MTE rooftops).

<sup>17</sup> See Notice at ¶¶ 41-44.

<sup>18</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 at ¶ 1179 (1996) ("*Local Competition Order*").

unequivocally that circumstances demand clarifying this statement for purposes of implementing Section 224.

**B. Section 224 Does Not Require Authorization By MTE Owners For Telecommunications Carrier Access To Utility Distribution Facilities.**

Section 224 grants access to rights-of-way that are owned or controlled by utilities. The statute assumes that the MTE owner has already granted the utility an interest in the right-of-way to which the statute mandates telecommunications carrier access. Nevertheless, many utilities and real estate interests claim that Section 224 does not grant telecommunications carriers a federal right to access utility rights-of-way. Instead, they contend, MTE owners may unilaterally void this federal right by refusing access to competitive telecommunications carriers.<sup>19</sup>

Section 224 was designed to eliminate the need for telecommunications carriers to obtain separate rights-of-way from MTE owners.<sup>20</sup> Requiring telecommunications carriers to obtain the authorization of the underlying MTE owner would eviscerate the intent of Section 224.<sup>21</sup> In

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<sup>19</sup> See, e.g., Comments of American Electric Power et al. at 16; Ameritech at 3-4; BellSouth at 13; Cincinnati Bell at 5-6; City and County of San Francisco at 10-11; Communication Associations Institute at 17; Cornerstone Properties et al. at 10-11, 35; Florida Power & Light at 22; National Association of Counties et al. at 9; Real Access Alliance at 28-29; SBC at 3; and UTC/Edison Electric Institute at 5.

<sup>20</sup> See Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd 6777 at ¶ 2 (1998) ("The purpose of Section 224 of the Communications Act is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers."); see also *id.* at ¶ 5 (noting "Congress' intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants").

<sup>21</sup> Section 253(c)'s preservation of State and local right-of-way management authority preserves the ability of States and municipalities to require telecommunications carriers to seek governmental authorization before installing their facilities in the public rights-of-

essence, the utility and real estate theory would have telecommunications carriers duplicate the utility distribution network by obtaining their own right-of-way authority, rendering Section 224 as nothing more than superfluous verbiage. In adopting Section 224 Congress clearly did not contemplate this result. To the contrary, Section 224 seeks to avoid such unnecessary duplication so as to facilitate the development of facilities-based competition in the least disruptive manner to public and private property. A statute must not be construed so as to render any provision meaningless.<sup>22</sup> Indeed, even if the interpretation of Section 224 proposed by the Commission were to effect a taking -- and it does not do so -- it would be upheld by the courts since no other interpretation (*i.e.*, requiring underlying property owner consent) could achieve the goals Congress sought to achieve through enactment of that provision of the statute.<sup>23</sup>

Similarly, the Commission must prohibit agreements between utilities and MTE owners that proscribe the use of intra-building rights-of-way or conduit by telecommunications carriers.

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way (even when such rights-of-way are owned or controlled by utilities). Of course, this State and municipal authority must be exercised on a competitively neutral and nondiscriminatory basis. By contrast, the Communications Act does not contain a preservation of underlying MTE owner authority to require telecommunications carriers to obtain MTE owner approval for accessing a utility's rights-of-way within the MTE.

<sup>22</sup> See, e.g., Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990) (noting the Supreme Court's "deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"); see also, Walters v. Metropolitan Educational Enterprises, 117 S.Ct. 660 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect") (citing United States v. Menasche, 348 U.S. 528, 538-539 (1955)).

<sup>23</sup> Although courts seek to avoid statutory interpretations that implicate serious constitutional problems with the statute, they refrain from this tendency when such interpretations would be contrary to the intent of Congress. See Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 629-630 (1993) (citations omitted).

Utilities cannot be permitted to contract away their federal obligations.<sup>24</sup> Indeed, such agreements could operate in a manner similar to exclusive access agreements by making it difficult, if not impossible, for competing facilities-based carriers to obtain access to certain MTEs. And, once again, Section 224 would be rendered meaningless -- simple for monopolies to evade.

Similarly, the comments of utilities and real estate interests conflict as to who precisely controls access to rights-of-way within and on top of MTEs. Utilities claim either that they do not own or control intra-MTE rights-of-way and conduit, or that such rights-of-way and conduit may be used exclusively by the utility.<sup>25</sup> By contrast, some of the real estate interests contend that they do not maintain or control the intra-MTE rights-of-way but rather that the ILECs and other utilities control who may operate in those distribution facilities.<sup>26</sup>

The conflicting accounts very well may reflect sincere misunderstandings. Many of these utility rights-of-way and conduits within MTEs were created and are operated without the benefit of a written agreement clarifying the rights and interests of the respective parties.<sup>27</sup> Predictably, then, the precise scope of the utility rights and interests within MTEs remains difficult to discern.

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<sup>24</sup> See Brooklyn Savings Bank v. O'Neill, 324 U.S. 697, 710 (1945)("[C]ourts have uniformly held that contracts tending to encourage violation of laws are void as contrary to public policy"); see also In re Trans World Airlines, Inc., 145 F.3d 124, 135 (3rd Cir. 1998)("Contracts that are void as against public policy are unenforceable regardless of how freely and willingly they were entered into.").

<sup>25</sup> See Comments of Ameritech at 3; Avista at 2 (case-by-case inquiry as to ownership or control); BellSouth at 10; Cincinnati Bell at 3, 5; Florida Power & Light at 13; GTE at 22; SBC at 5; USTA at 3, 8; and UTC/Edison Electric Institute at 6.

<sup>26</sup> See, e.g., Comments of Cornerstone Properties et al. at 35.

<sup>27</sup> See, e.g., Comments of Apex Site Management at 8 ("Apex acknowledges that the incumbent LECs currently enjoy an economic advantage over the competitive LECs

The process of defining the scope of such rights will be somewhat arbitrary if left to these parties. The responsibility for this process, therefore, should lie not with the utilities and the MTE owners who may act upon incentives unfriendly to telecommunications competition; rather, the Commission should assume this role and should clarify that conduits and rights-of-way within and on top of MTEs are owned and/or controlled by utilities.

The practical result of a lack of clarity concerning the scope of utility interests within MTEs affects not only Section 224 interpretations, but MTE access generally. Competitive facilities-based telecommunications carriers seeking to install cables in MTE risers with the permission of the MTE owner sometimes encounter ILEC claims of exclusive ownership of those riser spaces. Without a written agreement to the contrary, the MTE owner retains little basis to assert otherwise. The tenants and the CLECs are thereby left without the means to access each other, notwithstanding an MTE owner's willingness to permit competitive telecommunications carriers within the MTE.

Teligent's own experience offers evidence of this phenomenon. Notwithstanding MTE owner claims to the contrary, Bell Atlantic has contended to Teligent that it owns the risers that travel vertically from floor to floor in Boston MTEs. Incredibly, it has gone so far as to request from Teligent a list of all buildings and risers in Boston to which MTE owners have granted Teligent access, ostensibly to check whether any risers Bell Atlantic may claim to control are

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because their occupancy often is free and not subject to a written agreement."); Cornerstone Properties et al. at 13 ("ILECs demand access to buildings, but refuse to sign agreements with building owners, pay license fees, or otherwise accept the terms and conditions the building owner has set for access by *all* TSPs, often threatening to withhold service from tenants. Given the tremendous market power of the ILECs and the tenant demand for their service, an owner can do little in these circumstances but give in to their demands.").

covered. It seeks to prohibit telecommunications carriers from accessing these MTE risers. Clearly, such a policy would potentially have a severe effect on the ability of consumers in MTEs to take telecommunications service from competitive facilities-based carriers. Whether the MTE owner or Bell Atlantic owns or controls access to Boston MTE risers is an issue demanding resolution. In addition, ILECs cannot be permitted to assert ownership as a means of preventing facilities-based competition within MTEs. Application of Section 224 to intra-MTE conduits and rights-of-way and clarification of ownership would deter ILECs from engaging further in this strategy.

**C. The Application Of Section 224 Within And On Top Of MTEs Would Be Constitutionally Sound.**

The application of Section 224 to intra-MTE conduit and rights-of-way would provide for adequate compensation to the underlying utility in a constitutionally sound manner. Hence, it cannot be regarded as an unconstitutional taking of utility property.<sup>28</sup> Moreover, the MTE owner has already granted these property interests to utilities, so no additional property interests are being "taken" from the MTE owner. To the extent that a utility must exercise its eminent domain authority to provide space for telecommunications carriers, the MTE owner will be compensated appropriately by the utility and the telecommunications carrier will reimburse the utility for that expense, pursuant to the Commission's pole attachment modification rules. Hence, the constitutional rights of the underlying property owners will be preserved.

Notwithstanding the constitutional soundness of this approach, Teligent suspects that the need for a utility to exercise eminent domain authority within MTEs will be a very rare

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<sup>28</sup> See Gulf Power Co., No. 98-2403, slip op. at 18 (11th Cir.).

occurrence. Because eminent domain proceedings can be lengthy and expensive, most parties -- CLECs, utilities and MTE owners -- strongly prefer to avoid them. Nevertheless, the utilities' eminent domain obligations serve an important function. Without the right to resort to eminent domain, there does not necessarily exist an incentive for utilities and MTE owners to negotiate CLEC access to MTEs. By contrast, the CLEC's right to demand utility exercise of eminent domain authority acts as an incentive for all parties to negotiate reasonably for access.

**D. The Commission Should Decline To Resurrect Issues That It Has Considered And Reconsidered Without Revision.**

Utilities raise several issues that have already been decided by the Commission and have not been opened for reconsideration in this docket. For example, utilities claim that Section 224 applies only where the utility uses its distribution network for wire communications or utility purposes.<sup>29</sup> Section 224 applies to the *entire* distribution network of a utility, whether that utility is using the facilities for its core business (*i.e.*, the distribution of electricity) or for some other purpose (*i.e.*, the transmission of telecommunications or video signals).<sup>30</sup> This interpretation of the provision is entirely sensible given the goals underlying Section 224. Were Section 224 to apply *only* to those particular utility distribution facilities actually used for wire communication, only a very small fraction of the utility networks would be available for telecommunications carrier access. The provision itself would be almost entirely ineffective in promoting the efficient construction of facilities-based telecommunications networks. Nor can the access provisions of Section 224 apply only to the distribution network used for the utility's core

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<sup>29</sup> See, e.g., Comments of American Electric Power et al. at 22; GTE at 24.

<sup>30</sup> *Local Competition Order* at ¶ 1173.

business. The 1996 Act made it possible for electric utilities to provide telecommunications service to the public, and many utilities are pursuing this goal. In their comments, the real estate interests discuss the substantial leverage that incumbent utilities wield when it comes to securing rights-of-way.<sup>31</sup> There is no reason to believe the strength of a traditional monopoly is not exerted when the monopolist seeks to enter new business areas. It would be nonsensical to prohibit telecommunications carrier access to these distribution networks -- particularly given the fact that competitive telecommunications carriers must allow access to *their* distribution networks.<sup>32</sup> The Commission should reject utility attempts to seek reformation of this sound interpretation of the Act.

In addition, utilities have sought to deny wireless telecommunications carriers the access benefits of Section 224 since enactment of the 1996 amendments.<sup>33</sup> They take this opportunity to revisit that issue.<sup>34</sup> Repeatedly, the Commission has wisely rejected these attempts.<sup>35</sup> Again, the

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<sup>31</sup> See, e.g., Comments of Apex Site Management at 8; Community Associations Institute at 33; Cornerstone Properties et al. at 13; and Real Access Alliance at 32.

<sup>32</sup> See 47 U.S.C. § 224(a)(1)(defining a utility to include local exchange carriers without distinguishing application of the utility obligations on a LEC's incumbent or new entrant status).

<sup>33</sup> See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *Petition for Reconsideration of Consolidated Edison* at 11-12; *Florida Power & Light Petition for Reconsideration* at 24-26; see also *Infrastructure Owners Petition for Reconsideration* at 26-29 (1996).

<sup>34</sup> See, e.g., Comments of American Electric Power et al. at 22; GTE at 24.

<sup>35</sup> See, e.g., Implementation of Section 703(a) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd 6777 at ¶ 39 (1998)("Wireless carriers are entitled to the benefits and protection of Section 224.").

Commission should dismiss utility contentions that somehow, on the basis of the technology used, wireless providers are *not* telecommunications carriers and thereby not covered by Section 224(f)(1).

**III. THE COMMENTS DEMONSTRATE THE PRESSING NEED FOR A FEDERAL NONDISCRIMINATORY MTE ACCESS REQUIREMENT.**

The comments filed in this rulemaking demonstrate that unreasonable restrictions on telecommunications carrier access to MTEs are slowing the development of telecommunications competition. The ALTS comments contain pages and pages of examples of unreasonable MTE owner behavior that has prevented telecommunications carriers from serving consumers within MTEs.<sup>36</sup> Significantly, the ALTS comments contain many examples of landlords refusing tenants the ability to access their telecommunications carrier of choice.<sup>37</sup> Although real estate and utility interests claim the marketplace is working and that MTE owners have every incentive to accommodate the desires of their tenants, the empirical record evidence demonstrates otherwise. The primary responsibility for the implementation of the 1996 Act remains with the Commission. Its application to individual consumers cannot be left to the whims of MTE owners, particularly when it is demonstrated that consumers in MTEs continue to be denied the benefits of competition.<sup>38</sup>

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<sup>36</sup> See Comments of the Association for Local Telecommunications Services at 6-18.

<sup>37</sup> See *id.*

<sup>38</sup> See Comments of McLeodUSA at 2 ("the primary obstacle to bringing full facilities-based competitive service to our Cedar Rapids customers is the refusal of landlords of multi-tenant dwelling units (MDUs) for residential, and multi-tenant environments (MTEs) for business, to allow access to their premises to provide service to their tenants, McLeodUSA's customers").

**A. The Market Is Not Operating Properly.**

Not surprisingly, some real estate interests assert that the real estate market is competitive and responsive to tenant desires.<sup>39</sup> The implication is that if tenants are not given the telecommunications options they desire, they can always move locations. This proposition is flawed for several reasons.

First, the financial benefits of telecommunications competition must exceed the substantial costs of moving locations for the rational consumer to move locations for that purpose. The likelihood of such a scenario is slim. Indeed, given the high cost of moving locations vis-a-vis the financial benefits of telecommunications competition, the general competitiveness of the real estate market is not relevant. The more appropriate inquiry is the competitiveness of telecommunications offerings within individual MTEs. Commenters have demonstrated that telecommunications competition within MTEs, while developing, is not sufficiently vibrant and widespread to support the more general development of competition.<sup>40</sup> That is, restrictions on CLEC access to MTEs (and the provision of service to consumers therein) make it less likely that CLECs will obtain the economies of scale necessary to justify further build-out of their networks. Commenters have also demonstrated that this unfortunate condition is directly tied to the unwillingness of MTE owners to permit telecommunications carrier access

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<sup>39</sup> See, e.g., Comments of Real Access Alliance at 5, 24.

<sup>40</sup> See Comments of the Association for Local Telecommunications Services at 3; Competitive Telecommunications Association at 3; ICG Telecom Group at 4; MCI WorldCom at 2, 7; McLeodUSA at 2-3; Personal Communications Industry Association at 23; RCN at 7; RF Development at 2; Sprint at 9-10; Wireless Communications Association International at 19-20.

on a reasonable and nondiscriminatory basis.<sup>41</sup> Consequently, the Commission cannot reasonably expect marketplace forces to remedy this situation in an adequate manner.

Moreover, Teligent reiterates that consumers should not be confronted with the Hobson's choice of moving locations or enjoying telecommunications competition. Equal access requirements and number portability obligations were designed to overcome the barriers that lesser inconveniences pose to the development of competition. A *laissez-faire* approach in the context of nondiscriminatory MTE access would be antithetical to the rationale underlying these other policies. CLECs would need to find zealots to take their service because of the costs and burdens of access while ILECs would merely need to find ordinary customers. One cost of this entire issue is the perpetuation of monopoly in derogation of the language and goals of the 1996 Telecommunications Act.

The logic of the adoption of the 1996 Act itself offers yet another analogy and demonstrates the unreasonableness of the position of some in the real estate industry on this issue. Prior to 1996, several States had already opened their local telecommunications markets to competition, while local markets in other States remained closed. The rationale of the real estate position would have counseled against the need for federal telecommunications legislation. Given the constitutionally-protected right to travel, consumers desiring a choice of local carriers could simply move to those States that had already implemented local competition. States would be aware that they would lose tax revenues from massive population migrations, and hence would possess an adequate motivation to implement local telecommunications competition. In the meantime, consumers could enjoy telecommunications competition if it was important to

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<sup>41</sup> Id.

them only by moving to a different State. Of course, this proposition is unsound and, fortunately, and we think, obviously, Congress rejected such a rationale. The suggestions by some in the real estate industry that the market presents an adequate mechanism for ensuring consumer choice in MTEs is equally unrealistic. Teligent strongly urges the Commission to recognize that, contrary to the real estate position, the market is not an adequate mechanism.

As Teligent explained in its comments, the operation of natural market forces is further foreclosed by the lock-in effect.<sup>42</sup> The lock-in effect is deepened further by the increased costs to consumers of relocating in order to obtain competitive telecommunications options. The Real Access Alliance asserts that the average commercial lease extends for 3-5 years.<sup>43</sup> If it were true, this alone is too long for a consumer to wait before enjoying telecommunications competition. However, there is evidence, some of it coming from the Alliance itself, to suggest that the Alliance has understated the average length of a commercial lease. Not only has Teligent found in its own experience that commercial leases tend to be offered in five year increments with five years typically constituting the *minimum* length of a commercial lease, but a leading member of the Alliance recently testified before Congress that the average duration of a commercial lease is actually *ten* years.<sup>44</sup> Requiring consumers in MTEs to wait a decade before incurring the costs of moving for competitive telecommunications options is not a realistic market-based alternative.

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<sup>42</sup> In the context of nondiscriminatory access, the lock-in effect is the product of the length of a tenant's lease, the cost of breaking that lease, the cost of moving or relocating a business, and the higher rents that are likely to result from the move given the health of the real estate markets.

<sup>43</sup> Comments of Real Access Alliance at 7.

<sup>44</sup> See Eric Avidon, "REIT Group Backs Bill Requiring Periodic Rehab," *National Mortgage News* (March 22, 1999)(President of the National Association of Real Estate Investment Trusts stating that the average commercial lease duration is ten years).

**B. If Left Unchecked By The Commission, The Exercise Of ILEC Dominance Will Perpetuate The Discriminatory Treatment Of Telecommunications Carriers.**

The real estate industry comments confirm that ILECs receive preferential treatment from MTE owners by virtue of the ILECs' dominant position in the telecommunications marketplace.<sup>45</sup> If the Commission does not take action in this proceeding, this situation is likely to persist, and perhaps worsen, slowing the development of telecommunications competition. Indeed, the effects of discrimination and unreasonable MTE access restrictions extend beyond a particular MTE. Discriminatory and unreasonable restrictions on CLEC access to MTEs impede CLECs from taking advantage of scale economies. The number of potential CLEC customers in any given geographic area is limited by MTE access restrictions in that same geographic area. Pervasive access restrictions limit the amount of traffic that CLECs require to support installation and operation of a node or switch to serve a particular geographic area.<sup>46</sup> If a limited number of

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<sup>45</sup> See, e.g., Comments of Real Access Alliance at 31 ("in the traditional environment, the ILEC had just as much monopoly power over the property owner as it did over the telephone subscriber"); Apex Site Management at 8 ("Apex acknowledges that the incumbent LECs currently enjoy an economic advantage over the competitive LECs because their occupancy often is free and not subject to a written agreement."); Cornerstone Properties et al. at 13 ("ILECs demand access to buildings, but refuse to sign agreements with building owners, pay license fees, or otherwise accept the terms and conditions the building owner has set for access by *all* TSPs, often threatening to withhold service from tenants. Given the tremendous market power of the ILECs and the tenant demand for their service, an owner can do little in these circumstances but give in to their demands.").

<sup>46</sup> Given the competitive conditions in which they operate, CLECs, unlike the ILEC, cannot recover these costs from a captive rate base.

MTEs or customers are available for competitive service in a given area, CLECs will be unable to efficiently incur the costs of a switch or node to serve that area.<sup>47</sup>

The resolution proposed by the RAA -- namely, adjusting the power relationships between the MTE owner and the ILEC -- will also not work to remedy the problem.<sup>48</sup> This proposal would merely result in the replacement of one dominant entity with incentives adverse to competition with another dominant entity with incentives that, if not adverse to competition, are often inconsistent with that goal.

Instead, a reasonable and nondiscriminatory MTE access requirement would allow the marketplace, rather than a dominant entity, to determine which carriers are best able to serve consumers in MTEs. ILEC advantages that MTE owners elect to continue to provide would be extended to other telecommunications carriers so as to ameliorate the exertion of MTE owner power over new entrants' MTE access that would otherwise be harmful to telecommunications competition. Alternatively, MTE owners would impose on ILECs the same rates, terms, and

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<sup>47</sup> In this manner, MTE owners contribute to the phenomenon of which they complain. Several MTE owners complain that CLECs will not serve *all* of their MTEs or *all* of their tenants. See, e.g., Comments of Real Access Alliance at 44-45. This complaint confuses common carrier obligations with carrier of last resort obligations -- two very distinct requirements, the latter of which has not been found appropriate to impose upon CLECs (although the Commission's universal service rules do provide an incentive to serve a greater variety of customers). Of course, Teligent finds it difficult to believe that a CLEC would refuse to accept a customer that would be willing and able to take the CLEC's services at the CLEC's tariffed rates. Indeed, as common carriers, CLECs are prohibited from discriminating among similarly situated persons. See 47 U.S.C. 201(b). Nevertheless, to the extent that MTE owners impose costs and restrictions on CLEC access to MTEs, they further diminish the areas that CLECs can serve economically and thereby reduce competitive entry for a larger geographic area than just the restricted MTE.

<sup>48</sup> See Comments of Real Access Alliance at 46.

conditions for access that are imposed on new entrants. In this manner, the MTE access advantages derived from the ILEC's monopoly power would be dismantled, and competition increasingly would take place on the basis of service and rates. Most probably, a compromise between the two positions would be achieved so that neither the ILEC nor the MTE owner could dominate the matter of access to MTEs. In the end, though, consumers would benefit from the reasonable and nondiscriminatory access that telecommunications carriers could achieve by the Commission's alteration of the power paradigm.

**C. Some Real Estate Industry Interests Are Inconsistent With The Federal Interest In Telecommunications Competition.**

Some real estate interests press the case that the MTE owner is the only party with an incentive to balance the goal of telecommunications competition with other interests such as building security, structural integrity, and the well-being of tenants generally.<sup>49</sup> Teligent and other carriers consistently have expressed a desire and intent to ensure the adequate protection of the totality of reasonable concerns facing MTE owners and have entered into contractual arrangements with these MTE owners respecting this interest.<sup>50</sup> However, even assuming *arguendo* that the MTE owner is the only entity with an interest in the totality, it does not follow that the MTE owner will refrain from seeking unreasonable commitments from telecommunications carriers. The real estate comments demonstrate that many MTE owners

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<sup>49</sup> See Comments of Cornerstone Properties et al. at 32; Real Access Alliance at 61-62, 67-69.

<sup>50</sup> See e.g., Comments of Teligent at 16-17; see also MTE Access Agreements attached to these Reply Comments which contain provisions addressing these MTE owner concerns.

have increased incentives to extract the maximum financial benefits from a developing competitive market in telecommunications.<sup>51</sup>

As the Alliance explains, the 1996 Act significantly altered the relationship between MTE owners and telecommunications carriers.<sup>52</sup> Some MTE owners now expect to gain revenues from the increased demand for telecommunications services made possible and created, in part, by the 1996 Act.<sup>53</sup> The benefits of telecommunications competition are not infinite although, properly implemented, the Telecommunications Act of 1996 will permit consumers, telecommunications carriers, and MTE owners all to enjoy the benefits of a vibrant and competitive telecommunications market. However, some MTE owners, in seeking to secure *all* of the surplus benefits of competition, go beyond appropriating the surplus and begin to interfere with the ability to produce at optimal levels. The aggregate effects of this surplus extraction make society worse off and interfere with the optimal outputs that could otherwise be produced by fixed wireless and other telecommunications technologies. While the actions of these MTE owners will stifle the development of competition, the limited competition that is nonetheless able to develop will reap lesser benefits for consumers than would otherwise be available.

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<sup>51</sup> See, e.g., Comments of Real Access Alliance at 25 (asserting that some landlords may attempt to lower rents by charging more for telecommunications access rights).

<sup>52</sup> Comments of Real Access Alliance at 31 ("[I]n the traditional environment, the ILEC had just as much monopoly power over the property owner as it did over the telephone subscriber. The property owner needed its tenants to have service as much as the tenants needed the service. In the new competitive world, the relationship between telecommunications providers and property owners is completely different.")

<sup>53</sup> See *id.*

The comments of some in the real estate industry assert that nondiscriminatory telecommunications carrier access to consumers in MTEs would operate as a subsidy from the real estate industry to the telecommunications industry.<sup>54</sup> To the contrary, nondiscriminatory access represents an effort to prevent windfalls to MTE owners that produce negative social effects. Unreasonable and excessive MTE owner rent extractions from telecommunications carriers will limit the dynamism of one of the principal mechanisms of our economy -- telecommunications. Moreover, outright access restrictions, unreasonable access conditions, and excessive access fees will limit consumer choice thereby disabling the proper functioning of a competitive market. Hence, contrary to some real estate industry assertions, nondiscriminatory access is a mechanism to ensure that no single interest group will disrupt the balance of a competitive marketplace. To the extent that non-discriminatory access results in greater tenant satisfaction, it reaps an added benefit for the MTE owner.

**D. The Real Access Alliance Survey Is Inadequate.**

Assuming *arguendo*, that the Real Access Alliance survey ("RAA Survey") is deemed to be sound -- which it is not (as explained below) -- it presents some very troubling statistics. For example, lengthy negotiation delays can and often do mean lost customers. Competition delayed is competition denied. According to the RAA Survey, approximately one out of every five respondents had been involved in MTE access negotiations lasting over a year.<sup>55</sup> This

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<sup>54</sup> See, e.g., Comments of Cornerstone Properties et al. at 36; Real Access Alliance at 29; Real Access Alliance Economic Analysis at 23. This position is odd given that telecommunications carrier access to MTEs (and the improvement of MTE telecommunications networks) will enhance the value of MTEs. Any subsidies created by a nondiscriminatory MTE requirement flow to MTE owners from the value enhancement of their property (as well as to consumers).

<sup>55</sup> See Survey attached to the Comments of the Real Access Alliance at 8.

excessively long negotiation period precedes a lease and eventual facility installation.<sup>56</sup> It is unrealistic to expect a customer to wait for the CLEC it was interested in taking service from for this lengthy period of time, particularly given that the ILEC can take advantage of these access delays by signing the customer immediately to a new plan. CLECs cannot compete fairly operating under such extreme disadvantages. Moreover, it is obvious that many consumers are denied competitive choice when the market would, but for this flaw, make it available to them.<sup>57</sup> The Commission can and should declare that it is patently unreasonable and anticompetitive for MTE owners to drag out access negotiations for longer than 30 to 45 days from the date of a customer request for service. Teligent has found, unfortunately, that most negotiations take substantially longer to conclude. The RAA statistics suggest that the plight of the CLECs is a significant competitive barrier redounding to the overwhelming benefit of the incumbents.

Moreover, 44 percent of respondents did or may have denied telecommunications carrier access *entirely*.<sup>58</sup> The survey does not eliminate the possibility that a significant portion of the remaining 56 percent of respondents may have permitted telecommunications carrier access, but only pursuant to unreasonable rates, terms, and conditions.

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<sup>56</sup> One CLEC explained that it is not uncommon for its staff to wait as long as four to six months to begin access negotiations. See Comments of NEXTLINK at 40.

<sup>57</sup> The Chairman has expressed an understanding of the principle that Commission intervention is warranted where the market is not working to serve the needs of consumers. See Remarks of William E. Kennard, Chairman, Federal Communications Commission at the National Association of Telecommunications Officers and Advisors 19th Annual Conference (Sep. 17, 1999)("You need regulation when market-based incentives are not aligned with the needs of consumers.").

<sup>58</sup> See Survey attached to the Comments of the Real Access Alliance at 5.

Nevertheless, the RAA Survey purportedly submitted to represent the collective position of the real estate interests, lacks a sufficiently sound response rate to justify reliance on it for Commission action. Only five percent of Alliance members responded to the survey. Presumably, there are MTE owners that are *not* members of the Real Access Alliance. Hence, the number of U.S. MTE owners represented by the survey is actually *less than* five percent. The fact that only five percent of Alliance members took the time to respond to the survey (with its alarmist introduction)<sup>59</sup> should inform the Commission that the real estate industry -- as opposed to its trade associations -- is not unduly concerned or alarmed by the prospect of nondiscriminatory telecommunications carrier access to MTEs. Moreover, the opinions of 95 percent of the Alliance's members are not even represented in the survey.<sup>60</sup> Due to the five percent response rate, the RAA Survey can hardly be considered representative of the Alliance members generally.

In addition to the poor response rate of the survey, the survey results themselves are distorted by the RAA written comments. For example, the Alliance devotes pages of its comments detailing the building security calamities that it alleges are sure to occur in the event of nondiscriminatory telecommunications carrier access requirements.<sup>61</sup> Yet, only 2 percent of survey respondents (that is, only 2 percent of the mere 5 percent of Alliance members that

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<sup>59</sup> The survey's introduction was not neutral and unacceptably skewed responses to the survey in opposition to nondiscriminatory access.

<sup>60</sup> The lack of cooperation with the survey by 95 percent of RAA members may also have been a function of the self-selective nature of the survey. RAA members that have been uncooperative or unreasonable with CLECs may have declined to respond to the RAA Survey for that reason.

<sup>61</sup> Comments of Real Access Alliance at 61-65.

responded) listed building security as their primary cost or inconvenience associated with installing a new wireless competitive communications provider.<sup>62</sup> This hardly supports the premise that this is the primary issue troubling the real estate industry in contemplating nondiscriminatory access. However, the alarmist Alliance comments fail to assign the proper place to this issue within the debate.

Teligent has repeatedly demonstrated its steadfast commitment to the preservation of MTE security, as have other CLECs.<sup>63</sup> Indeed, given that the Commission's rules require *all* LECs to comply with relevant wiring and safety codes, telecommunications carriers will continue to be required to comply with NSC and NESC requirements (as well as local fire codes and safety requirements) pursuant to any rules adopted in this proceeding. Finally, because the integrity of their networks and transmission capabilities are at stake in unsafe or hazardous environments, CLECs have incentives, aside from MTE owners' concerns, to ensure that safety and security measures are adequate and failsafe.

**E. The Commission's Decisions Must Be Premised Upon A Correct Understanding Of The Legislative And Judicial Actions Surrounding Nondiscriminatory MTE Access.**

**1. The Absence Of Federal Legislation Has No Substantive Meaning.**

The real estate industry mischaracterizes the legislative and judicial actions related to nondiscriminatory telecommunications carrier access to MTEs. It is important that the Commission base its decision in this rulemaking on a proper reading of the relevant law. For example, the real estate industry claims that Congress contemplated a mandatory MTE access

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<sup>62</sup> See Survey attached to Real Access Alliance Comments at 11.

<sup>63</sup> See Comments of Teligent at 16-17; Sprint at 12.

statute for cable operators and ultimately decided against it.<sup>64</sup> The real estate industry uses this as support for the position that had Congress intended to provide a federal nondiscriminatory right of access for telecommunications carriers to MTEs, it would have provided for it more explicitly.<sup>65</sup>

The absence of more explicit access legislation cannot properly be used as a basis for such a proposition.<sup>66</sup> To the contrary, it is equally plausible if not more so that Congress saw no need to enact expensive mandatory access legislation because Section 224 and other provisions of the Communications Act already accomplished that goal.<sup>67</sup> Nevertheless, the congressional decision not to pursue mandatory access for cable operators via a statutory vehicle separate from Section 224 over a decade ago likely was premised upon a variety of factors -- including the

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<sup>64</sup> See Comments of Real Access Alliance at 41-42 (discussing the legislative history of Section 621(a)(2) of the 1984 Cable Act).

<sup>65</sup> Id.

<sup>66</sup> The Supreme Court has expressed a strong reluctance to draw inferences from Congress' failure to enact legislation granting an agency specific authority. See Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988), citing American Trucking Ass'n, Inc. v. Atkinson T. & S.F.R. Co., 387 U.S. 397, 416-18 (1967); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381, n.11 (1969).

<sup>67</sup> Rep. Pickering recently informed Chairman Kennard that the Commission already had sufficient authority to implement a nondiscriminatory MTE access requirement. See Letter from Hon. Chip Pickering, House of Representatives, Congress of the United States, to the Hon. William E. Kennard at 1 (Aug. 5, 1999)("To the extent that occupants of multi-tenant buildings are restricted in their access to radio or wire communications from their carrier of choice due to a landlord's control over transmission facilities within a building, the FCC already has jurisdiction to remedy the problem.); see id. at 2 ("[T]he agency already possesses the tools to resolve the building access issue so that commercial and residential occupants of multi-tenant buildings nationwide can enjoy the benefits of telecommunications competition. I would encourage the FCC to use that authority . . .").

different policy objectives of cable access and telecommunications carrier access -- and the absence of more explicit legislation itself cannot be assigned the force of law.

Moreover, it is entirely possible that many years before the 1996 Act, the barrier to telecommunications competition (a nascent concept, itself) presented by MTE access restrictions did not possess the severe ramifications that it does today. Teligent has explained to the Commission that, until recently, unreasonable restrictions on MTE access have not received a good deal of attention from the biggest players in the telecommunications industry because in the early years of competitive development, most telecommunications entry strategies by large companies were premised upon a UNE or resale model. As these models are proving uneconomic in the long term, leaders in the telecommunications industry are beginning to pursue facilities-based entry strategies.<sup>68</sup> Unreasonable MTE access restrictions represent a chief barrier to the success of facilities-based entry strategies.

2. The Commission Should Not Rely Upon Congress To Manage The Telecommunications Industry.

As unreasonable MTE access restrictions have multiplied, Congress may well believe that the Commission retains sufficient statutory tools to remedy the problem. Indeed, it is important to remember that Congress should not be relied upon to manage the phenomena affecting the telecommunications marketplace. This role is appropriately delegated to the Commission.<sup>69</sup>

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<sup>68</sup> See Comments of Teligent at 6-7.

<sup>69</sup> See, e.g., F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)("Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."); see also National Broadcasting Co. v. U.S., 319 U.S. 190, 218-219 (1943)("True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which

Where, as in this instance, the Commission's existing authority permits it to eliminate a barrier to telecommunications competition, it does not need to -- in fact, should not -- await the enactment of more explicit federal legislation before it acts.

3. The Sections Of The Cable Act Relied Upon By The Real Estate Industry Are Wholly Irrelevant To The Nondiscriminatory Access At Issue In This Rulemaking.

Some in the real estate industry also point to a line of cases interpreting a Cable Act provision as support for the notion that nondiscriminatory MTE access has been deemed unconstitutional.<sup>70</sup> Their severely flawed analysis is misleading. The cases cited concern the application of a specific statutory provision -- not the concept of access itself -- with a policy foundation different from the nondiscriminatory access considered in this docket. Indeed, the cases restrict themselves to interpretation of the specific wording in that statutory provision and do not address the constitutional inquiry.<sup>71</sup> The statutory wording actually is wholly inapplicable

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was both new and dynamic. . . . the Act gave the Commission not niggardly but expansive powers."); see also Philadelphia Television Broadcasting Co. v. F.C.C., 359 F.2d 282, 284 (D.C. Cir. 1966)("Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry").

<sup>70</sup> See Comments of Real Access Alliance at 42. The statutory provision to which the Alliance cites -- Section 621(a)(2) reads: "Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses . . . ." 47 U.S.C. 541(a)(2)(emphasis added).

<sup>71</sup> See Cable Holdings of Georgia v. McNeil Real Estate, 953 F.2d 600, 605 (11th Cir. 1992), cert. denied, 506 U.S. 862 (1992); Media General Cable of Fairfax v. Sequoyah Condominium Council of Co-Owners, 991 F.2d 1169, 1174 (4th Cir. 1993).

to the nondiscriminatory access requirements contemplated by the Notice.<sup>72</sup> Consequently, the cases relied upon by the real estate industry have no bearing upon the issues confronting the Commission in this docket.

**F. The Commission Should Prohibit Exclusive Access Arrangements.**

Almost all commenting parties are opposed to exclusive access arrangements.<sup>73</sup> Even real estate interests admit that exclusive access arrangements disserve consumers in MTEs.<sup>74</sup> Given the nearly unanimous disapproval of exclusive access arrangements and the Commission's clear authority to regulate such arrangements, the Commission should prohibit exclusive access arrangements between telecommunications carriers and MTE owners.<sup>75</sup> Specifically, on a going

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<sup>72</sup> By its terms, the application of Section 621(a)(2) is limited to *public* rights-of-way and *dedicated easements* (that is, easements legally and expressly dedicated by the building owner to general utility use).

<sup>73</sup> Comments of AT&T at 20-21; Bell Atlantic at 5-6; Central Texas Communications Inc. at 5; Competitive Policy Institute at 17-18; Competitive Telecommunications Association at 13; Ensemble Communications at 6; Global Crossing at 3-5; GTE at 16; Level 3 Communications at 6; Metromedia Fiber Network Services at 5; Personal Communications Industry Association at 11; RCN at 17-18; SBC at 7; SpectraPoint Wireless at 6; Sprint at 12; Wireless Communications Association International at 30-31.

<sup>74</sup> See Comments of Cornerstone Properties at 33 ("In general, broadly written exclusive contracts are not desirable . . . we recognize that exclusive TSP agreements may inhibit tenant choice of services and TSPs."); Community Association Institute at 33 ("[T]here are certainly occasions where incumbent monopolistic cable companies have leveraged their position as the single source of telecommunications services to force community associations and their residents into unfavorable or exclusive contracts . . .").

<sup>75</sup> As the Wireless Communications Association International explains, Section 21.902(b) of the Commission's rules bars any licensee from entering into any lease with a building owner that prevents another licensee from entering into a lease with the same building owner for operation of its own facilities. See Comments of Wireless Communications Association International at 31. This anti-exclusivity rule ensures that radio licensees are permitted to operate within their licensed territories without exclusive agreements of other licensees prohibiting such operation. An anti-exclusive access rule in the MTE access context would be derived from the same underlying principle.

forward basis, the Commission should prohibit any carrier subject to Part 61 of the Commission's rules (even if the Commission has forbore from applying Part 61 rules) or otherwise subject to the Commission's jurisdiction, from entering into an exclusive access arrangement with an MTE owner.<sup>76</sup>

Some CLECs urge the Commission to allow exclusive access agreements, claiming that such arrangements permit carriers to serve MTEs that otherwise would go unserved or to recoup the costs associated with investment in the MTE.<sup>77</sup> The Commission should not promote CLEC entry plans whose viability relies upon the creation of monopoly environments through exclusive access arrangements. This policy would *not* promote competition -- indeed, it would do the opposite -- and it would lessen consumer welfare by prohibiting the marketplace from increasing choice, improving service, and lowering rates. Moreover, it flouts the principle of consumer choice. It prevents consumers from making the choice best suited to their differing needs, instead allowing a landlord to make a one-size-fits-all decision to further the landlord's own perceived interests.

GTE asserts that "[n]ew entrant telecommunications carriers have been signing exclusive contracts at enormous rates, locking up entire buildings and sealing off further competitive

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<sup>76</sup> The Commission's authority to adopt rules in promotion of the Act's objectives was recently confirmed by the Supreme Court. See AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. 721, 730, 733 (1999).

<sup>77</sup> See, e.g., Comments of First Regional Telecom at 6-7; OpTel at 14-15 (explaining that "exclusive arrangements help to justify and finance the significant investment required in network facilities needed to provide service to residents"). It should be noted that Teligent and many other facilities-based CLECs are able to and willingly do accept the risk of investing in network facilities to provide service to consumers in MTEs.

inroads that could be made by other carriers."<sup>78</sup> It goes so far as to erroneously cite to Teligent *customer service* term agreements as support for this proposition. Teligent does not enter into exclusive access arrangements with MTE owners or managers despite the offering of such arrangements by MTE owners and managers. Teligent has made it clear to its site acquisition representatives that they cannot enter into exclusive access arrangements with MTE owners or managers.

Of course, consistent with industry practice, Teligent *does* offer price reductions and other benefits to *end users* who agree to use Teligent's telecommunications services exclusively for a period of time.<sup>79</sup> This is the customer service contract to which GTE refers. These arrangements by a new entrant like Teligent do not restrict telecommunications carrier access to MTEs and, indeed, are not even agreements with the MTE owner (except, of course, where the MTE owner happens to be a Teligent end user and is entering an agreement with Teligent for its own business-related telecommunications services). They represent the exercise of consumer choice in telecommunications carriers. GTE's citation to such contracts as support for the exclusive access practices of other telecommunications carriers is a disingenuous attempt to

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<sup>78</sup> GTE Comments at 17. Teligent acknowledges that there are CLECs entering into such exclusive access agreements. Indeed, Teligent has been denied access to MTEs because of another CLEC's exclusive access arrangements.

<sup>79</sup> Consistent with the practices of many carriers in the telecommunications industry, Teligent has sometimes entered into "preferred provider" marketing agreements with MTE owners. However, these agreements do not and are not intended to impose access restrictions -- either in theory or in practice -- on other telecommunications carriers. So long as telecommunications carriers obtain nondiscriminatory access to consumers in MTEs, MTE owners should remain free to endorse or otherwise market to tenants one or more competing services.

mislead the Commission regarding this very important issue. Teligent has long opposed exclusive MTE access arrangements.

**IV. A NONDISCRIMINATORY MTE ACCESS REQUIREMENT WOULD NOT AMOUNT TO A TAKING AND IS CONSTITUTIONALLY SOUND.**

Teligent and other commenters explained to the Commission that an MTE access requirement premised upon a nondiscrimination obligation is not appropriately analyzed pursuant to the *per se* taking analysis of *Loretto*.<sup>80</sup> Instead, given the analysis in *Yee, Florida Power*, and the *Heart of Atlanta Motel* line of cases, it is clear that an inquiry into whether a nondiscriminatory regulatory obligation constitutes a taking should be pursued under the analysis used in *Penn Central*. Application of this analysis yields the conclusion that a nondiscriminatory MTE access requirement would *not* amount to a taking of private property.<sup>81</sup>

Nevertheless, some commenters claim that the *Penn Central* analysis and the *Heart of Atlanta Motel* line of cases are inapplicable.<sup>82</sup> They fail to understand that the result of physical occupation of a property owner's premises does not automatically trigger a *per se* analysis. Indeed, *Yee, Florida Power, Heart of Atlanta Motel* and a host of other similar cases all involved physical occupation by persons on the premises of another. The analysis is more sophisticated than some utilities and real estate industry commenters would have the Commission believe and

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<sup>80</sup> See Comments of Teligent at 57; Association for Local Telecommunications Services at 21-22; AT&T at 43; Sprint at 19.

<sup>81</sup> See Comments of Teligent at 59-60.

<sup>82</sup> Comments of Real Access Alliance at 37-39.

the notion that they assert -- that interference with the right to exclude is a *per se* taking -- is simply wrong.<sup>83</sup>

Other commenters assert that the *per se* takings analysis applies because nondiscriminatory MTE access requires an MTE owner to do more than simply permit nondiscriminatory access to space already set aside for utility use.<sup>84</sup> These commenters assert that the requirement that an MTE owner permit occupation of space not already set aside for telecommunications carrier use would operate as an initial physical occupation and thus implicate the *Loretto* analysis.

A nondiscrimination requirement that persons be given access to facilities not otherwise set aside for use by the public does not amount to a *per se* taking. Indeed, the Americans with Disabilities Act requires MTE owners across the country to modify their structures -- and permit use of space not already set aside for this purpose -- so that persons with disabilities would be able to have access to MTEs.<sup>85</sup> No federal court has ever found such a requirement to amount to a taking. Indeed, one property owner challenged the constitutionality of the ADA on this basis, claiming that the remodeling required under the statute would result in the loss of as many as 20 seating places in his restaurant. The court expressly concluded under this set of facts that "the ADA merely proscribes the use of part of his own property and it therefore could be likened to a zoning regulation. Since the ADA merely regulates the use of property and does not give anyone

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<sup>83</sup> See, e.g., Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 708 (9th Cir. 1999).

<sup>84</sup> See Comments of the National Association of Counties et al. at 10-11.

<sup>85</sup> See 42 U.S.C. § 12101, *et seq.*

physical occupation of [the restaurant owner's] property, it is not within the Supreme Court's first [*per se*] category of takings."<sup>86</sup>

This scenario is highly analogous to the nondiscriminatory MTE access requirement at issue in the instant rulemaking. The technologies that are used to transmit and provide telecommunications are more varied than they were even a decade ago. Even if ILECs do not always use rooftops to transmit telecommunications, the failure to provide access to such spaces would operate as discrimination against newer, more efficient providers. As an analogy, restroom sizes and doorway widths historically may have been too small to accommodate wheel chairs. The expansion of restroom and doorway entrance facilities (and the concomitant reduction in other space) is not a taking but simply the reasonable accommodation necessary to accomplish socially beneficial nondiscriminatory objectives. The same rationale applies to the new technologies employed by CLECs.

Other commenters claim that permitting access to the ILEC does not sufficiently open the property to the public such that the government has a valid interest in requiring nondiscriminatory access to others.<sup>87</sup> The fact is, though, that until very recently, one entity -- the ILEC -- constituted the entirety of the local telecommunications industry. The fact that industry participants have multiplied is irrelevant to the application of nondiscrimination protections -- indeed, the need for such protections is enhanced particularly where discrimination persists. Where MTE owners have opened their properties to outside providers of

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<sup>86</sup> Pinnock v. Int'l House of Pancakes Franchisee, 844 F.Supp. 574, 587 (S.D.Cal. 1993).

<sup>87</sup> See, e.g., Comments of National Association of Counties et al. at 10-11; Real Access Alliance at 38.

telecommunications services, they should be required to provide nondiscriminatory access to *all* providers of telecommunications services to their tenants.<sup>88</sup>

Variants of this argument suggest that the MTE owner had no choice but to permit ILEC access to the MTE given its historical monopolist position.<sup>89</sup> Had additional telecommunications providers existed, the argument goes, the MTE owner could have placed conditions on and charged fees for access. These commenters argue that it is unfair now to require the residual benefits of the monopolist's power to extend to new entrants. This position ignores the underlying goal of the Telecommunications Act of 1996 -- to introduce competition and dismantle monopoly control over local telecommunications networks for the benefit of consumers. Throughout the Act, it is evident that in order to facilitate the development of competition, Congress sought precisely to make available to all telecommunications carriers the benefits that the ILEC had obtained by virtue of its monopoly. Section 224 provides nondiscriminatory telecommunications carrier access to the ILEC's (indeed, to *all* utilities') poles, ducts, conduits, and rights-of-way.<sup>90</sup> The unbundling requirements of Section 251(c)(3) provide CLEC access to portions of the ILEC network that were constructed and operated by virtue of being a monopoly provider -- including the ILEC's intra-MTE facilities.<sup>91</sup> Section 253 prohibits

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<sup>88</sup> Of course, where MTE owners provide their tenants with telecommunications services themselves (rather than permitting outside telecommunications carriers to provide such services), it would be more appropriate for the Commission to contemplate the imposition of not only nondiscriminatory access requirements, but also the more varied obligations required of local exchange carriers generally.

<sup>89</sup> See Comments of Real Access Alliance at 39.

<sup>90</sup> 47 U.S.C. § 224(f)(1).

<sup>91</sup> 47 U.S.C. § 251(c)(3); see also "FCC Promotes Local Telecommunications Competition; Adopts Rules on Unbundling of Network Elements," CC Docket No. 96-98 *Public Notice*

States and local governments from perpetuating the monopolist's favored position at the expense of competitive entry.<sup>92</sup> An MTE access requirement premised upon a nondiscriminatory obligation would accomplish similar goals through similar means.<sup>93</sup>

Application of the *Penn Central* test demonstrates that a nondiscriminatory MTE access requirement would not amount to a regulatory taking. Several commenters claim that a nondiscriminatory MTE access requirement would harm the MTE owners' investment-backed expectations and, consequently, would qualify as a regulatory taking.<sup>94</sup> It is important to note that the effect of regulatory action on a property owner's investment-backed expectations is only one prong of the *Penn Central* analysis and, standing alone, is not conclusive evidence of a regulatory taking.<sup>95</sup> Nevertheless, it is far from clear that MTE owners possess investment-backed expectations for telecommunications carrier access to their property. According to the RAA Survey, only 9 percent of respondents (that is, 9 percent of the mere 5 percent of RAA

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(rel. Sep. 15, 1999)(summarizing *Third Report and Order and Fourth Notice of Proposed Rulemaking*)(*"UNE Remand Public Notice"*).

<sup>92</sup> 47 U.S.C. § 253(a).

<sup>93</sup> Moreover, the assertion that the MTE owners *had* to open their properties to outside telecommunications providers is contradicted by the real estate industry comments which provide numerous examples of MTE-owner installed and operated MTE telecommunications systems. See, e.g., Comments of Real Access Alliance at 9, 18, 22; Allied Riser Communications Corp. at 2.

<sup>94</sup> See, e.g., Comments of Arden Realty at 7; Real Access Alliance at 42, 58.

<sup>95</sup> See Penn Central Transportation Co. v. New York City, 438 U.S. 104, 130-131 (1978) (finding that the "takings" analysis does not divide property rights and attempt to determine whether each has separately been violated, but rather focuses on "both the character of the action and the nature and extent of the interference with the [property] rights . . . as a whole." The effect on an owner's investment-backed expectations are but one part of the takings analysis.).

members that responded to the survey) mentioned revenue as their primary motivation for permitting telecommunications carrier access to their MTEs.<sup>96</sup> This suggests that investment-backed expectations for telecommunications carrier access to MTEs, if they do exist, are not widely held in the real estate industry.<sup>97</sup>

Even if investment-backed expectations were widely held, a nondiscriminatory MTE access requirement would not deny a return on an MTE owner's investment in telecommunications carrier access. A nondiscriminatory access requirement allows the MTE owner to charge telecommunications carriers a reasonable access fee. It would follow, then, that the more carriers that are permitted entry into an MTE, the more the MTE owner will realize any "investment-backed" expectations for access fee revenues. Indeed, only *unreasonable* access fees would be prohibited. Unreasonable expectations on investment returns are not preserved under the *Penn Central* analysis.<sup>98</sup> Moreover, the enhanced value of the MTE resulting from the presence of multiple telecommunications carriers will more than offset any reduction in access fees that MTE owners could collect under a nondiscriminatory regime; some MTE owners just choose to ignore this fact.

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<sup>96</sup> See Survey attached to Comments of Real Access Alliance at 15.

<sup>97</sup> In fact, MTE owners cannot reasonably assert that they possessed investment-backed expectations for telecommunications carrier access to MTEs constructed prior to the enactment of the Telecommunications Act of 1996.

<sup>98</sup> Penn Central Transportation Co., 438 U.S. at 136 (explaining that the New York City law at issue permitted a "reasonable return" on Penn Central's investment).

**V. THE COMMISSION'S JURISDICTION TO ACCOMPLISH NONDISCRIMINATORY MTE ACCESS IS NOT CREDIBLY DISPUTED BY THE COMMENTS.**

Teligent and many other commenters provide several bases of Commission authority to require MTE owners to permit nondiscriminatory telecommunications carrier access to consumers in MTEs.<sup>99</sup> However, several commenters claim that the Commission lacks authority to require nondiscriminatory MTE access.<sup>100</sup> They go so far as to suggest that the Commission itself has already decided it lacks the requisite authority.<sup>101</sup> The separate statements of the Commissioners cannot be viewed as final opinions on matters that had not yet been commented upon and presented by interested parties to the Commission for its consideration.<sup>102</sup> Indeed, Commissioners consider the record before them and that record is still being developed.

The Commission retains jurisdiction over persons engaged in interstate wire communication.<sup>103</sup> By their own admission, MTE owners are persons engaged in wire communication.<sup>104</sup> In some instances, MTE owners actively operate telecommunications

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<sup>99</sup> See Comments of Teligent at 23-53; Association for Local Telecommunications Services at 20-22; Bell Atlantic at 4; Competitive Telecommunications Association at 6; Personal Communications Industry Association at 18-19; Sprint at 16-17.

<sup>100</sup> See, e.g., Comments of Cornerstone Properties et al. at 5-6, 11; Real Access Alliance at 34-37.

<sup>101</sup> See, e.g., Comments of USTA at 7.

<sup>102</sup> 5 U.S.C. 553(c)(APA requirement that agency consider comments filed by the public).

<sup>103</sup> 47 U.S.C. § 152(a).

<sup>104</sup> See, e.g., Constitutional Analysis attached to the Comments of Real Access Alliance at 35 ("Building owners now often seek to provide a comprehensive bundle of services to their 'customers,' including, at least in some instances, the provision of telecommunications services"); Real Access Alliance at 9, 18, 22.

systems and provide telecommunications services to their tenants.<sup>105</sup> In other situations, MTE owners own or control the telecommunications facilities over which telecommunications signals are transmitted.<sup>106</sup> Still, in others, MTE owners control the only portion of the telecommunications distribution network that *cannot* be duplicated without the MTE owner's acquiescence (unless, of course, the utility owns or controls conduits or rights-of-way within the MTE that CLECs can use to construct facilities to end users within the MTE). This role alone is sufficient to bring MTE owners within the subject matter and *in personam* jurisdiction of the Commission.<sup>107</sup> Indeed, if the Commission fails to take action mandating nondiscriminatory access to MTEs, a situation may develop whereby *no* carriers -- neither CLECs nor ILECs -- are able to gain access to MTEs as MTE owners construct their own facilities and serve their tenants (and refuse them access to competitive carriers) outside the regulation of the Commission.

Some commenters claim that the Commission cannot exert authority over MTE owners simply because their actions may have an incidental effect on telecommunications.<sup>108</sup> However, the MTE owners' affect on telecommunications is not merely incidental if they are denying, delaying, discriminating in the terms of access, providing service themselves, or being paid on the basis of telecommunications revenues. Even where the MTE owner does not actively provide

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<sup>105</sup> Id. at 18, 22. Indeed, MTE owners actively operating intra-MTE telecommunications networks may qualify as local exchange carriers or, at a minimum, as telecommunications carriers as defined in the Communications Act.

<sup>106</sup> Id.

<sup>107</sup> See Comments of Teligent at 48-50 for a more extensive analysis of this position.

<sup>108</sup> See, e.g., Comments of National Association of Counties et al at 6; Real Access Alliance at 34.

telecommunications services to its tenants, the MTE owner is in a unique position of being able to restrict or deny access or raise the costs of serving a customer because it may control the one portion of the telecommunications network that cannot be duplicated absent MTE owner permission. For example, the MTE owners can significantly raise the cost of CLEC entry to the point that competitive options are eliminated within the MTE. In addition, some MTE owners themselves admit to doing what the Commission itself -- with its wealth of communications experience -- refuses to do: analyze each company and determine which is most suitable for consumers, rather than permitting consumers to make these decisions themselves.<sup>109</sup> Moreover, the comments indicate that not only are MTE owners discriminating against CLECs vis-a-vis ILECs, but also that MTE owners are discriminating on the basis of technology used by the telecommunications carrier.<sup>110</sup> The nationwide aggregate effect of this behavior on telecommunications competition and the development of new technologies is far from incidental. The Commission should not condone such results by a refusal to intervene. The Commission could choose to exercise its jurisdiction over an MTE owner only when an MTE owner blocks or threatens to block or otherwise seeks unreasonable compensation for telecommunications carrier access to a consumer in the MTE.

The comments further demonstrate that *Bell Atlantic v. FCC* is inapplicable to the nondiscriminatory MTE access requirement being considered in this docket.<sup>111</sup> It should be

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<sup>109</sup> See, e.g., Comments of Cornerstone Properties et al. at 5.

<sup>110</sup> See, e.g., Economic Analysis attached to Real Access Alliance Comments at 17-18.

<sup>111</sup> See, e.g., Comments of Personal Communications Industry Association at 21; WinStar at 43-45.

reiterated that no court has followed *Bell Atlantic* for the proposition asserted by the real estate industry. Indeed, although the real estate industry claims that courts have long held that the premise underlying *Bell Atlantic* limits agency action,<sup>112</sup> their comments are unable to cite to even one case in support of that proposition. Some commenters misstate the effect of the Tucker Act and even try to use the Anti-Deficiency Act as an obstacle to achieving nondiscriminatory MTE access.<sup>113</sup> Even a modest understanding of the two statutes reveals that neither the Tucker Act nor the Anti-Deficiency Act preclude Commission action in this docket. In its comments, Teligent explained how the *Bell Atlantic* case, and its application of the Tucker Act, is inapplicable to the nondiscriminatory MTE access context.<sup>114</sup>

The Anti-Deficiency Act is even more far afield. The Anti-Deficiency Act was designed to prevent federal agency assumptions of liability -- such as indemnification agreements -- without an appropriation by Congress.<sup>115</sup> The Anti-Deficiency Act clearly does not equate the federal government's express assumption of contractual liability with the risk that an agency's action will be judicially determined a taking. Indeed, nothing in the cases cited by commenters suggests that anything beyond an express federal government agency indemnification agreement would be prohibited by the Anti-Deficiency Act.

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<sup>112</sup>     See Comments of Real Access Alliance at 40-41.

<sup>113</sup>     See id.

<sup>114</sup>     Teligent comments at 65-75.

<sup>115</sup>     31 U.S.C. § 1341.

**VI. ENFORCEMENT OF NONDISCRIMINATORY MTE ACCESS REQUIREMENTS WILL NOT SUBSTANTIALLY BURDEN THE COMMISSION'S RESOURCES.**

Some commenters contend that a nondiscriminatory MTE access requirement will result in an unreasonable burden on the Commission's enforcement resources.<sup>116</sup> As Teligent explained in its comments, there is nothing to suggest that the need for Commission enforcement will be anything but rare. In the five years since the first State nondiscriminatory MTE access statute was enacted, Teligent, after exhaustive research, is not aware of any disputes brought formally before the public utility commissions in those States with nondiscriminatory access requirements. This is not surprising given that protracted litigation of disputes disserves the ultimate goals of all parties. Nevertheless, the *threat* of regulatory intervention serves as an incentive to resolve most disputes through negotiation.

The Commission's pole attachment complaint procedures offer yet another analogy. As the Commission stated last year

[f]rom 1979, when the first pole attachment complaint was filed with the Commission, to 1991, approximately 246 pole attachment complaints were filed. From 1991 through 1996, approximately 44 such complaints were filed. Currently [as of February 6, 1998], there are seven pole attachment complaints under review by the Commission's Cable Services Bureau. We view this number of complaints to the Commission, in light of the penetration of cable service in the nation's communities, to be indicative that most pole attachment rates are negotiated without resort to the Commission.<sup>117</sup>

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<sup>116</sup> See Comments of USTA at 16; Economic Analysis attached to Real Access Alliance Comments at 22; Constitutional Analysis attached to Real Access Alliance Comments at 38.

<sup>117</sup> Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd 6777 at ¶ 10, n.37 (1998).

Currently, there are only nine pole attachment complaints pending at the Commission, notwithstanding the substantial expansion of the scope of Section 224 through the 1996 Act and the Commission's expedited complaint procedures. Teligent submits that negotiations are successful largely because the Commission has framed the general rules of negotiation and because all parties know that regulatory intervention can result from unreasonable demands or behavior.

Indeed, almost any provision of the Communications Act or almost any section of the Commission's rules could be construed in an alarmist manner to portend a flood of complaints sufficiently substantial to drain the Commission's resources. These disasters tend not to happen, though. Generally speaking, parties prefer the speed of voluntary negotiations -- as imperfect as the end product may be -- to litigated resolution. The nondiscriminatory MTE access scenario is no different.

**VII. THE COMMISSION SHOULD REQUIRE RELOCATION OF THE DEMARCATION POINT IN ALL MTEs UPON REQUEST.**

The demarcation point should be relocated at the minimum point of entry ("MPOE") in all MTEs. No party has demonstrated the infeasibility of this approach nor can they explain why such an approach would not promote competition. In fact, even some ILECs support relocation of the demarcation point at the MPOE.<sup>118</sup> Given the record evidence of the technical feasibility of locating the demarcation point at the MPOE, the Commission should implement such a requirement for *all* MTEs, regardless of the date of wiring installation, upon MTE owner, customer, or telecommunications carrier request.

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<sup>118</sup> See, e.g., GTE Comments at 7.

A uniform demarcation point will lessen confusion surrounding deployment of competitive networks. Commenters have demonstrated that the Commission's rules, adopted in a single provider environment, can be very confusing in a competitive telecommunications market. The sometimes variant State rules add to this confusion. The demarcation point rules should facilitate competitive provision of telecommunications rather than increasing the difficulty of providing competitive facilities-based telecommunications service to consumers in MTEs. The Commission should revise its rules to accomplish this goal.

The Commission's decision in the UNE Remand proceeding<sup>119</sup> to make certain ILEC intra-MTE facilities available to competitors on an unbundled basis will facilitate the provision of service to consumers in MTEs and will eliminate the wasteful requirement that otherwise facilities-based CLECs lease entire loops in order to utilize only the intra-MTE portion of the ILEC facilities.<sup>120</sup> The Commission should take the opportunity in this very important proceeding to clarify that CLEC access to intra-MTE ILEC UNEs should be made available quickly and reasonably. Moreover, the Commission should prohibit ILECs from requiring the presence of ILEC technicians when telecommunications carriers connect their facilities with the intra-MTE facilities of the ILEC, given the technical expertise of CLEC technicians to disconnect

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<sup>119</sup> See *UNE Remand Public Notice*.

<sup>120</sup> The availability of intra-MTE facilities and the Section 224 access to intra-MTE conduits and rights-of-way are not duplicate means of entering a building. In some circumstances, only one option may offer the appropriate course. For example, where pre-existing intra-MTE wiring is inadequate to satisfy the CLEC service quality standards, the CLEC can use Section 224 to string its own cabling through the conduit and rights-of-way within the MTE. By contrast, where legitimate and demonstrable space constraints within the MTE preclude the installation of a CLEC's facilities, or where it is otherwise unnecessary to duplicate the ILEC's wire, the CLEC may still serve a consumer within the MTE by leasing the intra-MTE wiring from the ILEC on an unbundled basis.

and reconnect the wire themselves. In practice, the presence of ILEC technicians often is not required for such purposes. The Commission should confirm that no ILEC may, as a matter of course, require the presence of its technicians for CLEC connection with intra-MTE facilities. Any other approach would result in serious delay and substantial and unnecessary expense for the competing carrier and the customer.

However, Teligent consistently has explained that unbundling intra-MTE facilities is a second-best alternative -- not a replacement for -- relocation of the demarcation point to the MPOE. By relocating the demarcation point to the MPOE, facilities-based carriers can serve consumers in MTEs without reliance on the ILEC, which presents yet another layer of cost and delay to serving consumers in MTEs. By relocating the demarcation point to the MPOE, the CLEC can obtain MTE access pursuant to negotiations with the MTE owner only, thereby facilitating entry by facilities-based carriers (if, of course, MTE owners are required to comply with nondiscriminatory access obligations).

**VIII. CONCLUSION**

For the foregoing reasons, Teligent strongly urges the Commission to adopt rules that permit consumers in MTEs to receive telecommunications services from their facilities-based carrier(s) of choice on a reasonable and nondiscriminatory basis. The Commission has at its disposal various tools to ensure nondiscriminatory telecommunications carrier access to consumers in MTEs, and it should move to achieve this goal without delay.

Respectfully submitted,

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